U.S. Department of Labor **Office of Administrative Law Judges**
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 10 June 2003

In the Matter of

BETTY A. DEVERS *et al.*
Complainant

v.

KAISER-HILL COMPANY
Respondent

Docket No. 2001-SWD-00003

Todd J. McNamara, Esq.
Kristina James, Esq.
Denver, CO
For the Complainants

Raymond M. Deeny, Esq.
Colorado Springs, CO

William A. Wright, Esq.
Denver, CO

Gilbert Roman, Esq.
Gregory Kellum Scott, Esq.
Golden, CO
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a claim filed under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. 5851 (hereinafter "ERA"); Toxic Substances Control Act, 15 U.S.C. 2622 ("TSCA"); Solid Waste Disposal Act, 42 U.S.C. 6971 ("SWDA"); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610 ("CERCLA"), by six employees of the Kaiser-Hill Company ("K-H") who work at the Rocky

Flats Environmental Test Site ("Rocky Flats"). A formal hearing was held in Denver, Colorado from April 8 through April 17, 2002. On April 15th, most of the day was taken up by my view of the Rocky Flats site in the company of counsel for the parties. The parties filed lengthy post hearing briefs and reply briefs, the last of which was received on September 6, 2002.

The complainants allege that they were involuntarily transferred to other positions at Rocky Flats where they lost overtime pay, tent pay and/or crew leader pay because they reported safety issues to the respondent. Respondent contends that it encourages employees to file safety complaints, and that the six employees were transferred to different jobs in accordance with the union contract because their expertise was needed elsewhere in Rocky Flats. Respondent further argues that the complainants did not engage in protected activity under any of the statutes at issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Complainants are all employed by respondent Kaiser-Hill Company at Rocky Flats, which is a 6300 acre tract located 16 miles northwest of Denver, Colorado. K-H, a joint venture between Kaiser Group International, Inc. and CH2M Hill (TR 1405; CX 24, at pp.1, 4), is the primary contractor for the Department of Energy ("DOE") at that site. Rocky Flats is a facility where plutonium triggers for this country's nuclear weapons were manufactured until 1989. It is in the process of being decontaminated and decommissioned, which requires the removal of radioactive waste and plutonium-contaminated metals and powders and the demolition of 802 structures (CX 24, at 12). When this is completed, the land will be turned into a nature preserve. According to a report issued in February 2001 by the General Accounting Office for the House and Senate Armed Service Committees, "[t]he site's weapons production activities left high-risk radioactive and hazardous materials and wastes, severely contaminated buildings, and large areas of contaminated soil . . . ." (*Id.* at p. 1) The GAO went on to state that "[t]he job at hand is huge." (*Id.*)

Under K-H's most recent contract with DOE, which went into effect on February 1, 2000, the project is to be completed by December 15, 2006 (*id*. at 6). If the project is completed ahead of schedule and below the projected cost, K-H will receive substantial bonuses; conversely, if the project is delayed or exceeds projected costs, K-H will received a lower fee (*id*. at 7).

[1]Citations to the record of this proceeding will be abbreviated as follows: CX – Complainants' Exhibit; RX – Respondent's Exhibit; TR – Hearing Transcript.

Complainants are all decommissioning and decontamination ("D & D") workers. David Martin, Betty Devers, Shirley Voorhies and Dallas Sherman each worked at Rocky Flats between 17 and 20 years, while James "Joey" Miller and Tracy Rittenbach worked there about 2 ½ years each. At the time with which this case is concerned, all of the complainants worked in Building 771, which is a building where plutonium had been processed and is one of the most contaminated buildings at Rocky Flats (TR 56, 1293). All of the complainants except Voorhies are categorized as skilled D & D workers. Voorhies testified that she was a RCRA inspector at the time of the transfers in February, 2001. However, the collective bargaining agreement does not list a position of RCRA inspector (*see* EX 42, at 75). Rather, it appears that the job of RCRA inspector is also called a Hazardous Reduction Technician ("HRT"), which is a listed job title, or that being a RCRA inspector is a subcategory of the job of an HRT.[2] In March 2001, a month after she was transferred out of Building 771, Voorhies was promoted to a position as a Radiological Control Technician ("RCT") (TR 1276, 1279-80; *see also* EX 42, at 75).

Martin described D & D workers as:

> somebody that assists in the actual dismantling of the nuclear weapons plant, the buildings. Depending on their skills, they will either be involved with hands on with power tools and using their expertise in glove box work, or if they are not skilled, they will be relegated to other tasks that don't require quite as much skill.

(TR 52). As skilled D & D workers, Martin, Miller and Rittenbach spent most of their time working at glove boxes cutting up contaminated pipes and other equipment (which is euphemistically referred to as "size-reducing") from Building 771 or bottle-batching (collecting contaminated liquids and placing them into large containers) so the contaminated materials could be shipped off site for storage primarily to Department of Energy sites in Texas, Tennessee and South Carolina (CX 24, at 9). Sherman and Devers frequently worked in a facility referred to colloquially as "the birdcage". It was a box larger than a glove box used for cutting up larger and highly contaminated things such as glove boxes (TR 240-42, 427-28). The birdcage was located inside a tent in order to contain any radiation. The workers inside the tent wear full protective suits that look like the protective suits astronauts wear, and use supplied air so they do not breathe in any contaminated air. Voorhies's primary job duty as a RCRA inspector was to inspect the valves on the bottom of containment tanks and the pipes going into and out of those tanks for leaks of contaminated liquids (TR 1219). She inspected all over Building 771, on both the hot (contaminated by plutonium) and cold (not contaminated by plutonium) sides.

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[2]That Voorhies was an HRT is confirmed by the February 3, 2001 form reflecting her transfer to Building 881 (RX 12). Further, she was paid at the lower HRT pay level, not at the level of a skilled D & D worker. *Compare* TR 1282, line 20 *with* EX 42, at 74-75.

During the course of the complainants' employment in Building 771, each of them made complaints regarding the safety of the activities in which they or other workers were engaged. Those complaints will be discussed in detail below. It is the complainants' position that they were transferred out of Building 771 and assigned to work in other buildings at Rocky Flats due to these safety complaints.

Respondent's transfer of the complainants truly was bizarre. On the afternoon of Thursday, February 1, 2001, each of the complainants individually except Rittenbach, who was out sick, were called into the trailer which served as the office of Kelly Trice, respondent's vice-president who is the manager of Building 771, for a meeting. Trice was not at the meeting, which was attended by Rick von Feldt – the D & D Manager for Building 771 (TR 1629); Maurice "Hoss" Brown – the Deputy D & D manager for Building 771 (TR 696); Tom Dieter – the Operation Manager and Deputy Project Manager for Building 771 (TR 821-22); and a union steward, Al Williams. Rittenbach had a similar meeting on the morning of February 2nd. At these meetings, each of the complainants was told that he or she was being transferred to Building 881 (TR 103-05, 281-83, 453-54, 1262-63, 1459-60, 1549-50). Martin, Voorhies and Rittenbach all stated they were told that ultimately they were going to Building 371, whereas Devers, Sherman and Miller were not told that the transfer to Building 881 was an interim measure (*id.*). The workers were given written orders confirming their transfers to Building 881 (RX 7-12).

Building 881 is part of the Remediation and Industrial D & D Site Services ("RISS"), the organization responsible for the D & D work on the non-plutonium or South side of Rocky Flats as well as the infrastructure (*e.g.*, laundry, food services, and warehousing) for the entire Rocky Flats site (TR 1716-20; *cf.* RX 45). RISS is run by Rocky Flats Closure Site Services ("RFCSS"), a sub-contractor of the respondent (TR 1716). Two other Building 771 workers, Kelly Hall (RX 34) and Jason Haines (RX 33), were transferred to Building 881 with the complainants. An e-mail to Ernie Ebbs, to whom the complainants were instructed to report at Building 881, stated that the transfers of Devers, Sherman, Martin and Hall were permanent, whereas the transfers of Miller, Voorhies, Rittenbach and Haines were for 30 days only (CX 17). Frances Roberts, the Deputy General Manager of RFCSS who actually determined to which building in RISS the eight transferees would be assigned, also believed that four of the transfers were permanent and four were just temporary (TR 1727).

Despite having been sent an e-mail notifying him of the transfer of the eight workers, Ebbs had no idea they were being transferred to Building 881 when they showed up on the morning of February 5, 2001 (TR 107, 283, 460, 1264, 1460). Ebbs said he was going to call his supervisors to find out what to do with them . When he returned, he asked if any of the workers were qualified to work with beryllium. Parts of Building 881 were contaminated with beryllium just as parts of Building 771 were contaminated with plutonium. Workers had to be trained to work with beryllium and had the right to refuse to work in a beryllium building (TR 108). None of the eight workers agreed to work in Building 881 (TR 109, 1267, 1461, 1554). Then Ebbs, after conferring with Roberts (TR 1729), told them they were being transferred to Building 061, a

warehouse for used equipment taken from D & D sites, and they should report to Stephanie Iverson (*id.*). They did not receive written orders for this transfer (TR 111). So the next morning the workers reported to Iverson at Building 061, which is actually located outside the guard posts of Rocky Flats. When they arrived, Iverson seemed surprised to see them (TR 110, 1268-69, 1461). She made some phone calls, then stated she only could use two of the workers. Voorhies and Sherman were the two who remained at Building 061 (TR 1272). In regard to the other workers, Iverson took pieces of paper and wrote Building 130 on some and Building 551 on the others. These were two other warehouses. She folded the papers up and had the remaining workers draw lots to see who would be assigned to which of the two warehouses (TR 111, 284-85, 462-63,1462). Martin, Devers and Rittenbach picked 551 (TR 111, 114, 1555). Miller picked Building 130 (TR 1462). Again the workers did not receive written transfer orders (TR 122).

Martin testified that it appeared to him that Rich Nelson, the first line supervisor at Building 551, was surprised to see him when he reported to that building (TR 111). There was no D & D work going on at Building 551, and the only skilled D & D workers in that warehouse were Devers, Rittenbach and himself (TR 113-14). The rest of the workers there were in lower paid positions (TR 115). While in Building 551, Martin did inventory, put inventory stickers on products, shrink-wrapped water bottles and did housekeeping duties such as sweeping (TR 114). He stayed there for 60 days until he was finally transferred to Building 371 (TR 115, 122). In September, 2001, he was transferred again, to Building 707, a D & D building in the hot area (TR 122). He received written transfer orders for this move (*id.*).

Devers testified that in Building 551 her primary task was putting plastic labels on inventory shelves (TR 463). After a short time, Devers was approached by Greg Rold, who was heading up the D & D activities in Building 371. Rold asked her if she wanted to move to that building (TR 466). She stated that she did, and sometime in March 2001 she transferred to Building 371, where she helped plan the D & D work which was going to be done in that building (TR 467).

Sherman testified that Iverson kept him at Building 061 because he had a license to operate a forklift (TR 284). But in the month he spent at that building he drove a forklift only twice. Instead, he swept floors, broke down boxes, and cut the letters “DOE” (for Department of Energy) off surplus coveralls, among other things (TR 285). Although all of these activities are classified as D & D work under the union contract, Sherman nevertheless felt humiliated performing these tasks rather than the skilled work he had been doing in Building 771 (*id.*). After about a week at Building 061, Rold contacted Sherman and asked him if he wanted to transfer to Building 371. Sherman said he did, and within a few weeks he was reassigned there, where he also helped plan the D & D work (TR 286-88). In September, 2001 he transferred to Building 707 (TR 288).

Other than operating a forklift, Voorhies performed tasks similar to those identified by Sherman while she was at Building 061 (TR 1272-73). She worked at that warehouse until the end of March, when she was offered an RCT position, which was a promotion for her (TR 1276). She had applied to become an RCT in early 2000 (TR 1279-80). After a 12-week training program she became an RCT assigned to RISS, which is where she still works (TR 1278-79).

At Building 130, Miller was told by the building manager to "just help out where [he] could and try and learn the system." (TR 1462) He screened packages coming into the warehouse for explosives, moved pallets, and swept floors there (*id.*). He worked at Building 130 for about two months. While he was working there he was contacted by Rold, who asked if he wanted to do D & D work in Building 371. He said yes, and was transferred to that building (TR 1463). But in Building 371 all he did was move furniture, clean up some office areas, and escort engineers around the building. He was reassigned to Building 776 in September, 2001, which is where he works currently (*id.*). He did not object to this transfer (TR 1510). In addition to his employment at Rocky Flats, Miller runs a painting business from which he earns between $19,000 and $40,000 a year (TR 1473-74).

In regard to Rittenbach, shortly after moving to Building 551 he was contacted by Rold about moving to Building 371. He said he would like to move there, but it took until the beginning of March for the transfer to take place (TR 1603-04). He still works in Building 371.

Through all of the transfers, the complainants remained on the same shift and received the same basic pay and benefits (TR 181). However, while they were working at Building 771 they each worked numerous hours of overtime and in some cases received extra pay for hazardous work. Following their transfers out of Building 771, it took about six months before they were again able to work substantial overtime. *See, e.g.*, TR 123-28, 292-98, 512-17,1283-86,1465-70, 1562-65.

Despite my best efforts throughout the hearing to find out why the complainants were transferred from building to building in such a haphazard manner, none of respondents' witnesses provided a credible explanation. Under the circumstances, it is not surprising that the complainants believed that they were the victims of discrimination by the respondent. However, in light of my conclusion that this case must be dismissed due to lack of jurisdiction, there is no reason to determine whether the complainants were the victims of discrimination or merely inexplicable bungling.

Protected Activity

It is respondent's position that none of the complainants' activities in reporting safety concerns at Rocky Flats are protected under the environmental whistleblower provisions of any of the four statutes at issue. Because the case law clearly supports the respondent's position, I must recommend that this case be dismissed.

The case law sets out a dichotomy between *environmental* safety and *occupational* safety. Complaints impacting on environmental safety are covered under the whistleblower protection provisions of, *inter alia*, the ERA, TSCA, SWDA and CERCLA and are litigated before Department of Labor administrative law judges, whereas complaints which relate only to safety in the workplace fall under the Occupational Safety and Health Act ("OSHA"), and are litigated in United States District Court. *See* 29 C.F.R. §1977.3; *Tucker v. Morrison & Knudson*, 1994-CER-1, slip op. at 5 (ARB Feb. 28, 1997). Department of Labor administrative law judges do not have jurisdiction under the ERA, TSCA, SWDA and CERCLA and the other environmental statutes listed in 29 C.F.R. §24.1(a) over whistleblower complaints relating solely to workplace safety.

In *Tucker v. Morrison & Knudson, supra*, the Administrative Review Board discussed this dichotomy in detail as follows:

> The distinction between complaints about violations of environmental requirements and complaints about violations of occupational safety and health requirements is not a frivolous one. Worker protection for whistleblowing activities related to occupational safety and health issues is governed by Section 11 of the Occupational and Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), and enforced in United States Federal District Courts, not within the Department of Labor's administrative adjudicatory process. This point has been emphasized in previous environmental whistleblower cases. *See Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Ord., January 25, 1995, slip op. at 8. The Secretary has made it clear that there are jurisdictional limits to employees' complaints. Thus *DeCresci v. Lukens Steel Co.*, Case No. 87-ERA-113 [*sic*],[3] Sec. Dec., Dec. 16, 1993, slip op. at 4, discussed the whistleblower provision contained in the Energy Reorganization Act, 42 U.S.C. §§ 5851(1988):
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> > [T]he language of the statute and the Secretary's decisions make it clear that not every act of whistleblowing is protected under the ERA simply because the employer holds a license from the NRC. For example, an employee may complain that a government contractor such as Lukens retaliated against him for reporting that his employer has not complied with the requirements of Executive Order 11,246 which prohibits race and sex discrimination

[3]The correct case number for *DeCresci v. Lukens Steel Co.* is 87-ERA-13.

> in employment, but his recourse would be to file a complaint with the Office of Federal Contract Compliance Programs under the Executive Order and its implementing regulations, 41 C.F.R. §§ 60-1.32 (1992), not a complaint under the ERA. A complainant under the ERA must prove that retaliatory action was taken against him *because* he engaged in conduct listed in 42 U.S.C. §§ 5851(a)(1), (2) or (3), which the Secretary has interpreted broadly to mean any action or activity related to nuclear safety.

Tucker v. Morrison & Knudson, supra, at 5.

From the ARB's citation of *DeCresci v. Lukens Steel Co.* in its decision in *Tucker v. Morrison & Knudson,* one could get the impression that only concerns which are not related to health and safety, such as race and sex discrimination, would be characterized as "occupational" and excluded from coverage under the environmental whistleblower protection statutes. But the ARB continued its discussion of the occupational/environmental dichotomy in *Tucker* as follows:

> Similarly, in *Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2, Remand Order, Apr. 23, 1987, the Secretary remanded the case to the ALJ with instructions that:
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> > If Complainant has complained that one or more provisions of [EPA regulations dealing with emissions of asbestos to the outside air] had been violated by Respondent, such complaint would appear to be protected under 42 U.S.C. §§ 7622(a) [the Clean Air Act whistleblower protection provision]. On the other hand if complainant's complaints were limited to airborne asbestos as an *occupational* hazard, the employee protection provision of the CAA would not be triggered.
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> Slip op. at 3-4 (emphasis supplied). As set forth in those decisions, the environmental whistleblower provisions are intended to apply to environmental, and not other types of concerns.

Tucker v. Morrison & Knudson, supra, slip op. at 5.

Another case with a similar holding is *Jones v. EG & G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998), in which the Administrative Review Board stated:

> Employee complaints about worker health or safety may be protected under the environmental acts if they "touch[ ] on public safety and health, the environment, and compliance with the [environmental acts]." *Scerbo v. Consolidated Edison Co.*, Case No. 89-CAA-2, Sec. Dec. and Ord., Nov. 13, 1992, slip op. at 4-5. But when a complaint is limited solely to an occupational hazard, it is not protected under the environmental acts. *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1995, slip op. at 9; *see also Aurich v Consolidated Edison Co.*, Case No. 86-ERA-2, Sec. Rem. Ord., Apr. 23, 1987, slip op. at 3-4.

Jones v. EG & G Defense Materials, Inc., supra, slip op. at 10.

The same principle has been applied in cases brought under the ERA. In *Keene v. Ebasco Constructors, Inc*., 95-ERA-4 (ARB Decision and Order of Remand Feb. 19, 1997), the ARB stated that:

> Whistleblowers are protected under the ERA to further the Congressional purpose of protecting the *public* from the hazards of nuclear power and radioactive materials due to unsafe construction or operation of nuclear facilities. *Beck v. Daniel Const. Co.,* Case No. 86-ERA-26, Sec. Dec., Aug. 3, 1993, slip op. at 7. By protecting whistleblowers, safety and quality problems in the nuclear industry will continue to be brought to light and resolved before accidents or injury occur. *Hill v. TVA*, Case No. 87-ERA-23, Sec. Dec., May 24, 1989, slip op. at 9-10.

Keene v. Ebasco Constructors, Inc., supra, slip op. at 7 (emphasis added).

All of the safety issues raised by the complainants concerned their own safety and/or the safety of their co-workers. *See, e.g.*, RX 1 – the March 2, 2001 complaint filed with OSHA by the complainants. None of the complainants raised concerns impacting on the safety of the public, nor were they motivated by protection of the public. There were no concerns raised about radiation or other contaminants affecting anyone outside of Building 771, let alone anyone outside of Rocky Flats. Accordingly, although many of "Complainants' safety concerns and complaints were legitimate nuclear safety issues ..." (*Complainant's Post-Hearing Reply Brief* at 3), they were complaints regarding occupational safety, not environmental safety, and complaints regarding occupational safety are covered

by OSHA, not the ERA, TSCA, SWDA, or CERCLA.[4]

Several of the concerns raised by the complainants, all of which are in regard to Building 771, are reflected in Bargaining Unit Grievance forms or Joint Company/Union Safety Committee forms. Complaints raised in these forms are the following:

- On June 28, 2000, Martin, Miller and another D & D worker, Phil Housman, complained that

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[4]At TR 1305, while being cross-examined about her concerns regarding Building 771's ventilation system, Voorhies off-handedly mentioned that the ventilation system "is a health concern, not only for, for the public. If the ventilation system goes totally wrong and we vent to the public, we're –". This not fully articulated remark, which has not been edited, is Voorhies's entire discussion of the possible effects of her concerns on people other than herself or her co-workers in Building 771. That complainants' concerns could have repercussions outside of Building 771 is not otherwise mentioned or even suggested in the 1830-page transcript which includes complainant's counsel's 20-page opening statement; the 10-page single-spaced complaint filed by the complainants with OSHA; complainant's 17-page pre-hearing statement; and complainant's 99-page post-hearing brief. Only in reply to *Respondent's Post-Hearing Brief*, in which respondent specifically argued that none of the complainants' activities were protected because they were not related to the protection of the public, did complainants first attempt to argue that their complaints fell within the jurisdiction of the four whistleblower protection statutes under which this case was brought. They argued that there was a potential health risk to people such as members of Congress and DOE officials who tour Rocky Flats, or a risk of an implosion in Building 771 "following a chain reaction of explosions as a result of maintaining improper negative pressure - resulting in the death or injury of hundreds of workers ...." It is clear that complainants are grasping at straws in this belated attempt to establish jurisdiction over their complaints. Regarding the implosion theory, first, there is no evidence in the record that such an implosion is a possibility; second, none of the complainants expressed any concern that such a catastrophic event could occur; and third, as horrible as this hypothetical is, there is still no representation that members of the public, or the environment, would be harmed. In regard to the potential injury to people touring the facility, it is true that Building 771 has occasional visitors (including this judge), most of whom appear to be government officials inspecting the facility. But those occasional visitors, whose entrance into the building is highly regulated and closely monitored, do not make Building 771 a public facility, and it is a giant leap to argue that workers' concerns about their own health or safety should be considered to affect the public just because people who are not employed at Rocky Flats are in the building occasionally. It might be different if the hazardous activities were taking place in a building that is regularly open to the public and there is an allegation that these people could be injured by the hazardous activities. But Rocky Flats is not open to the public, and in any event when the complainants raised their concerns they did not allege that visitors to Building 771 might be injured. The only people they alleged might be injured were themselves and their co-workers.

their team's air conditioning unit was taken by a foreman, Dan Sinners, and moved into another room, and their chairs were removed (*see* CX 1). Although the removal of the air conditioning unit may have had safety implications to other workers in Building 771 because of where it was used after it was taken away from Martin's crew (*see* TR 856-60, 1380-83), the complaint raised by Martin and Miller was based solely on keeping themselves cool and had no nexus to safety, let alone environmental issues (TR 1377; *see also* TR 1482, 1520).

- On August 8, 2000, Voorhies complained that valves in Room 174 were leaking (RX 25).

- On September 25, 2000, Martin complained that new trailers did not have speakers which were used both for a PA system and as part of a warning system for the workers (CX 5; *see also* TR 137-38).

- On November 29, 2000, a grievance was filed with the union by Devers and possibly Sherman about an unexpected radiation exposure which occurred while Sherman was working inside the birdcage and Devers was assisting from outside the birdcage. Despite the radiation exposure, the crew was instructed to continue working until a pipe could be moved into the birdcage (TR 254-65; 421-31) This incident was grieved to the union, and the union representative, Robert Santangelo, filed a complaint on their behalf (CX 9). In addition to the written grievance, Devers (TR 441) and Sherman (TR 265) complained to virtually all the supervisors and Trice about this incident (TR 441).

- Early in December, 2000, Devers complained to her foreman, Paul Markal, and to Hoss Brown, and filed a grievance with the union, about radiation exposure occurring from paint chips that were falling off the ducts in Room 180 A and D (TR 444-45, 450-51). Work was stopped for two to three weeks due to this problem (TR 728).

- On January 18, 2001, Miller complained of contamination on a respirator (CX 12).

- On January 29, 2001, Miller complained that "Building Management" wanted the crew to use a type of bag with which the workers were not familiar (CX 13).

All of these complaints related, at most, to the safety of the workers, not to harm to the environment or to the public.

Other safety concerns were raised orally to supervisors and then up the chain of command. Devers testified that after a containment bag broke, releasing its contents on the floor of Room 146, she complained to Markal, and then to Brown, that the containment bags they were using were inadequate (TR 410-12). With the encouragement of the Industrial Hygiene office and Brown, she designed a new containment bag, but Kelly Trice, the building manager, would not recommend its use (TR 415-17). Several of the complainants testified that they complained frequently to their supervisors about being made to remain in the contaminated area of Building 771 even when they did not have any work to do there (*e.g.*, TR 79, 226, 420). Devers also

complained to Markal, Brown and Trice about exposure to nitric acid in Room 146 (TR 422-27); and to Markal that they needed equipment which could lift heavy pieces of glove boxes, to prevent a worker's protective clothing from ripping (TR 428).

In regard to Voorhies, as a RCRA inspector she was required to report possible safety problems, primarily leaks from containment tanks and pipes (TR 1219-20, 1224, 1230). Containment tanks contained liquids – anything from water to nitric acid – which are contaminated by radioactivity (TR 1224-25). Voorhies testified that the hazards posed by leaks of radioactive liquids are that the contaminants could get airborne and cause a worker to have an uptake, *i.e.*, the inhalation of contaminants into the lungs (TR 1228), or they could drip directly on a worker walking beneath a leaking pipe (TR 1230). Another part of Voorhies's duties as a RCRA inspector was to check gauges on glove boxes and ventilation systems (TR 1234). Again, her concern was protection of the workers (TR 1238). She testified that management did not always fix the problems she found quickly enough (*e.g.*, TR 1231-32, 1239), and she had to keep pressing her supervisors (TR 1227, 1231-32, 1235-36). Another duty of RCRA inspectors was checking bottles of contaminants stored in glove boxes to make sure that the bottles were where they were supposed to be (TR 1241-42). Voorhies also complained directly to Trice, who was present, that an industrial hygienist who was working in Room 146 inspecting for a nitric acid leak was not wearing a respirator (TR 1222).

Finally, Voorhies testified that in the beginning of January 2001, she indicated to her foreman, Court Tuck, and a union safety officer, Bob Santangelo, that she wanted to talk to DOE about ventilation problems in Building 771 which she believed may have contributed to radiation uptakes. Tuck and/or Santangelo mentioned to her that a DOE representative was going to be at Rocky Flats in a week or so to discuss problems in Building 771, and invited her to attend a meeting with the DOE representative when he was there. She attended the meeting, which was also attended by a health physicist, Kevin Konzen, and another man, and told them of her concerns regarding the ventilation in the building. *See* TR 1251-57, 1304-05.

The principle of ALARA, an acronym for "As Low As Reasonably Achievable," is central to this case. ALARA refers to exposure to radiation, the goal being to keep each workers' exposure as low as possible. Most of the complaints raised by the complainants concerned ALARA in one way or another. Obviously, eliminating unnecessary exposure to radiation in the workplace is a sound goal, and each worker had a right to be concerned with instances where ALARA may not have been complied with. However, by its very nature ALARA is an occupational safety issue, not an environmental safety issue. Its concern is that the workers not be exposed to radiation unnecessarily; it has no application to the public. Accordingly, although the complainants may have raised numerous concerns regarding instances where they believed ALARA was not complied with, and those concerns have serious health and safety implications, they do not fall under the protection of the environmental whistleblower statutes under which this case was brought.

For example, several of the complainants raised a concern that they were instructed to remain in a room in the hot, or contaminated, side of Building 771 when they had no work to do rather than being permitted to wait in an area where they would not be exposed to radiation (*e.g.*, TR 1532-33,1588-89). Although this may be a perfectly valid complaint, it is a concern which has no connection to anything other than their own safety, and clearly falls under OSHA. Other complaints along this line were the necessity of using in-line air when dealing with 12 normal nitric acid (TR 1536); the magnahelic gauge incident, in which Martin's crew allegedly was instructed to continuing working on a glove box despite the fact that the magnehelic gauge indicated that the recommended pressure for the box had been exceeded (*e.g.*, TR 95-100); and a radiation uptake that affected about 10 workers.

It must be stressed that this case does not deal with an operating facility such as a nuclear power or chemical plant, where malfunctions clearly could have catastrophic effects both on people and the environment. Rather, the complainants have not even alleged, let alone tried to prove, that any of the concerns they raised had the potential to impact the public. This is not to say that their concerns were unimportant or did not raise genuine issues of health and safety. But they were not concerns regarding conditions which could pose a hazard to anyone other than themselves and their co-workers at the worksite. Such concerns are occupational, and must be brought under OSHA.

Therefore, it is recommended that this case be dismissed for lack of jurisdiction under the ERA, TSCA, SWDA or CERCLA.

ORDER

IT IS RECOMMENDED that this case be dismissed.

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JEFFREY TURECK
Administrative Law Judges